Supreme Court, U.S.
FILED
DEC 31 1992
OFFICE OF THE CLERK

No. 92-932

In the Supreme Court of the United States

October Term 1992

Leon C. Baker, Petitioner

v.

J.R. Bennett and Laura Bennett, Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Arthur R. Miller
Attorney for Petitioner
1545 Massachusetts Ave.
Cambridge, Massachusetts 02138
Tel.: (617) 495-4111

Date: December 30, 1992

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... i

PRELIMINARY STATEMENT..... 1

PROCEEDINGS SUBSEQUENT TO THE FILING OF THE PETITION..... 1

A. The Alabama Garnishment..... 2

B. The Injunction Obtained by Mrs. Baker..... 3

C. The Alabama Circuit Court's Ex Parte Order..... 4

D. Merrill's Interpleader In Florida..... 5

E. The Bennetts Move On Notice For The Same Relief As Under the Ex Parte Order.. 6

F. The Alabama Circuit Court Issues Another Ex Parte Order..... 8

ARGUMENT..... 9

TABLE OF AUTHORITIES

Provisions of the United States Constitution

Fourteenth Amendment, Section 1..... 1

Commerce Clause, Article 1, Section 8 [3]..... 1

Full Faith and Credit, Article IV, Section 1..... 1

PRELIMINARY STATEMENT

This Supplemental Brief in Support of the Petition for Writ of Certiorari is being filed pursuant to Rule 15.7 to inform the Court of intervening matter not available at the time the petition was filed. Subsequent to the filing the trial court, the Circuit Court for Madison County, Alabama, has exacerbated its exercise of jurisdiction in violation of (a) the due process requirement of the Fourteenth Amendment and (b) the Commerce Clause of the United States Constitution. In addition, the Alabama Circuit Court has further disregarded the full faith and credit requirement in Article IV, Section 1 of the Constitution. It did so in a way that graphically illustrates the evils of the Alabama court's cavalier assertion of personal jurisdiction over a nonresident that is the subject of this petition for certiorari.

PROCEEDINGS SUBSEQUENT TO THE FILING OF THE PETITION

The petitioner (defendant below), Leon C. Baker ("Baker"), is a Florida resident. He has no property in

Alabama against which the judgment of the Alabama Circuit Court can be enforced. He and his wife as tenants by the entirety, however, have brokerage accounts with three securities firms, Merrill, Lynch, Pierce, Fenner & Smith ("Merrill"), Prudential Securities Incorporated ("Prudential"), and Shearson Lehman Brothers, Inc. ("Shearson"). The firms have possession of certificated securities of Baker and his wife as tenants by the entirety. None of these certificates are in Alabama (or ever were while the Bakers owned them).

A. The Alabama Garnishment

Nevertheless, the respondents (plaintiffs below), J.R. and Laura Bennett ("the Bennetts"), obtained from the Alabama Circuit Court garnishments that they served on the Birmingham, Alabama offices of the three brokerage firms, requiring each to deliver $530,135.06 to the Clerk of the Court, an amount equal to the sum of the judgment, interest, and $15,000 of additional "costs" the Alabama Circuit Court arbitrarily added to the judgment ex parte with neither hearing nor notice to Baker. The Bennetts thereby tied up assets of the Bakers aggregating

three times the amount of the judgment, interest, and additional "cost."

B. The Injunction Obtained by Mrs. Baker

The petitioner's wife, Gloria Baker, who is not a party to this action and who was not given notice of the garnishments, brought an action in the Circuit Court for Palm Beach County, Florida against the Bennetts, who are also Florida residents, and the three brokerage firms to enjoin the transfer to Alabama of any of the securities in which she has a tenancy by the entirety interest. The grounds were (a) that under Florida law tenancy by the entirety property may not be levied on, seized, or otherwise applied to an obligation of only one spouse, (b) that the Alabama Court has no personal jurisdiction over her, and (c) that the Alabama Court has no in rem jurisdiction over the securities. To preserve the status quo pending a hearing on Mrs. Baker's request for a permanent injunction, the Florida court, after notice to

all the parties[1] and a hearing on December 11, 1992, enjoined the parties from transferring any of the securities out of the brokerage accounts pending further order of the Florida court.

C. The Alabama Circuit Court's Ex Parte Order.

After regular office hours on the Friday evening following the Florida court's issuance of the temporary injunction, the Bennetts served on Merrill by facsimile transmission ("fax") to Merrill's Florida attorney a copy of an ex parte order the Bennetts had obtained from the Alabama Circuit Court two days before the issuance of the Florida temporary injunction. The order direct Merrill to deliver $530,135.06 to the Clerk of the Court, who was then to pay over the funds to the attorney for the Bennetts.

The ex parte order was procured five days after Mrs. Baker's motion for a temporary injunction was served on

[1]The Bennetts had not been served with process in the Florida action before the temporary injunction hearing, but Mrs. Baker delivered a copy of her complaint and motion for a temporary injunction to the Bennetts' attorney a week prior to the hearing, and the Bennetts' attorney appeared and participated in the hearing on the temporary injunction motion.

the Bennetts' Florida attorney. That attorney, who represented the Bennetts at the temporary injunction hearing, did not call to the Florida court's attention the ex parte order the Bennetts obtained in Alabama two days earlier.

D. Merrill's Interpleader In Florida

On Monday morning following receipt of the ex parte order Merrill, faced with conflicting orders from the Florida and Alabama courts, filed a counterclaim for interpleader in Mrs. Baker's Florida action. With the consent of Mrs. Baker and Baker, who is not a party to the Florida proceeding, and with no opposition from the Bennetts, Merrill obtained an order authorizing it to deposit $600,000 with the Florida court. The order provided, as is customary in interpleader cases, that Mrs. Baker and the Bennetts were enjoined from conducting proceedings in any other court to obtain the $600,000 so deposited.

E. The Bennetts Move On Notice For The Same Relief As Under the Ex Parte Order

Ignoring the December 9 ex parte order, the Bennetts simultaneously with Merrill's motion for interpleader in Florida and in defiance of the Florida court's temporary injunction, moved in Alabama for an order requiring Merrill to pay $530,135.06 to the Clerk of the Alabama Circuit Court. Baker cross moved to vacate the earlier ex parte order and also the ex parte order awarding the Bennetts $15,000 of additional "costs."

At the hearing the Bakers confirmed that, as reported by the brokerage firms in response to the garnishments, all the securities in their accounts were tenancy by the entirety property. In response the Bennetts argued that the brokerage accounts had been formerly in the Bakers' names as "joint tenants with rights of survivorship" and that the change of designation to "tenants by the entirety" was a fraudulent transfer.

Baker showed that under the law of Florida, where the Bakers and Bennetts both reside, when property is held by a husband and wife as joint tenants with rights

of survivorship, they are tenants by the entirety unless there is conclusive evidence to the contrary. *Strauss v. Strauss*, 148 Fla. 23, 3 So. 274 (Fla. 1st D.C.A. 1959), *Wilburn v. Wilburn*, 143 So.2d 518 (Fla. 2d D.C.A. 1962). Consequently, Baker maintained, there was no transfer at all, much less a fraudulent transfer.

In addition, Mrs. Baker testified, without contradiction, (a) that the Bakers have been married for more than 44 years, (b) that during all of those years they have both worked and always have deposited their earnings into bank accounts in both their names, and (c) that all of the securities in the brokerage accounts were purchased by checks drawn on the joint accounts. She maintained that the assets held by the brokerage firms are legitimately tenancy by the entirety property.

The Alabama Court reserved decision on both the Bennetts' motion to require Merrill to deposit funds with the Alabama court and Baker's cross motions to vacate the two ex parte orders.

F. The Alabama Circuit Court Issues Another Ex Parte Order.

The next day, however, December 15, 1992, again in defiance of the Florida court's temporary injunction, the Bennetts obtained from the Alabama Circuit Court a third ex parte order requiring Shearson and Prudential each to deposit $530,135.06 with the Clerk of the Court. Shearson and Prudential both moved for reconsideration on the grounds (a) that they were enjoined from making any such deposits by the Florida court's temporary injunction and (b) that Merrill was about to deposit $600,000 with the Florida court pursuant to its interpleader order and that the additional deposits in Alabama would tie up funds that are more than three times the amount of the judgment.

In response to the motions of Shearson and Prudential for reconsideration, the Alabama Circuit Court entered

an order requiring only Prudential to make a deposit. It still took no action with regard to Baker's motion to vacate the first two ex parte orders except that it did not order Merrill to make a second deposit in Alabama in addition to the one it had made in Florida.

ARGUMENT

As this recital of events subsequent to the filing of this petition for certiorari makes clear, the Alabama Circuit Court has persisted in disregarding the limits on its jurisdiction imposed by the due process and commerce clause provisions of the United States Constitution.

Perhaps most egregious of all, it has ordered the transfer to Alabama of Florida tenancy by entirety property in which Gloria Baker -- not a party to the proceedings which led to the original judgment or the proceedings to enforce the judgment -- has a very substantial interest. The Alabama Court siezed her interest in the property without service of any process on her and without any hearing or other legal proceeding in

which she was given an opportunity to be heard.

Moreover, in doing so the Alabama Circuit Court failed to give full faith and credit (a) to the law of Florida, where all the parties reside, that tenancy by the entirety property may not be levied on or otherwise applied by compulsory process to satisfy the indebtedness of only one spouse, (b) to Florida law that property held by a husband and wife as joint tenants with survival rights is tenancy by the entirety property, or (c) to the temporary injunction issued by a Florida court.

None of the matters set forth above, of course, is ripe for review by this Court since appeals from the Alabama Circuit Court have not yet been heard by the Alabama Supreme Court. Nevertheless, what the Alabama Circuit Court has done illustrates more graphically than any parade of horribles counsel for Baker might have presented to demonstrate how great a departure from traditional notions of fair play and substantial justice is possible if courts are permitted to obtain personal jurisdiction over residents of distant states on the basis of contacts as tenuous as unsolicited telephone calls. It

also demonstrates how promiscuous assertions of jurisdiction can cause disruptive mischief (a) to the lives and property rights of third persons and (b) to the lawful processes of the courts of other states.

As shown in the petition for certiorari, this is a highly appropriate case for this Court to define the limits on exercing personal jurisdiction over nonresidents when the defendants contacts with the forum are purely unsolicited interstate communications. The clearly defined issues in this case are likely to recur frequently and the decision below is likely to have a substantial adverse effect on interstate commerce.

Respectfully submitted,

Arthur R. Miller
Attorney for Petitioner
1545 Massachusetts Ave.
Cambridge, Massachusetts 02138
Tel.: (617) 495-4111